United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

B
P&S.

75-1225

To be argued by
T. BARRY KINGHAM

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 75-1225

UNITED STATES OF AMERICA,
Appellee,

—v.—

THOMAS DUVALL and HENRY JONES,
Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

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TABLE OF CONTENTS

PAGE

Preliminary Statement 1

Statement of Facts 3

The Government's Case 3

1. "The Prodigal Son"—The defendants' bad check business 3

2. Duvall's pretrial statements 8

The Defense Case 9

ARGUMENT:

POINT I—Duvall's motion to suppress his pretrial statements was properly denied 10

1. The arrest and ensuing statements 10

2. Duvall's testimony 14

3. The Trial Court's ruling 16

4. Duvall's pre-trial statements were voluntarily made 17

5. There was no violation of Duvall's Sixth Amendment right to counsel 19

POINT II—There was more than ample evidence to sustain the jury's verdict 22

POINT III—The Trial Court's sentence of Jones was lawful and proper in every respect 26

CONCLUSION 27

TABLE OF CASES

PAGE

Dorszynski v. *United States*, 418 U.S. 424 27

Kirby v. *Illinois*, 406 U.S. 682 (1972) 20

Mallory v. *United States*, 354 U.S. 449 (1957) ... 18, 19

Massiah v. *United States*, 377 U.S. 201 (1964) ... 10, 20

Miranda v. *Arizona*, 384 U.S. 474 (1966) ... 18, 19, 21

United States v. *Barone*, 467 F.2d 247 (2d Cir. 1972) 21

United States v. *Cassino*, 467 F.2d 610 (2d Cir. 1972), *cert. denied*, 407 U.S. 928 (1973) 25

United States v. *Collins*, 462 F.2d 792 (2d Cir.), *cert. denied*, 409 U.S. 988 (1972) 16, 18

United States v. *Counts*, 471 F.2d 422 (2d Cir.), *cert. denied*, 411 U.S. 939 (1973) 20

United States v. *Crisp*, 435 F.2d 354 (7th Cir. 1970), *cert. denied*, 402 U.S. 947 (1971) 21

United States v. *DeLoy*, 421 F.2d 900 (5th Cir. 1970) 22

United States v. *Diggs*, 497 F.2d 391 (2d Cir.), *cert. denied*, 419 U.S. 861 (1974) 21

United States v. *Dority*, 487 F.2d 846 (6th Cir. 1973) 21

United States v. *Edelman*, 414 F.2d 539 (2d Cir. 1969), *cert. denied*, 396 U.S. 1053 (1970) 22

United States v. *Fried*, 464 F.2d 983 (2d Cir.), *cert. denied*, 407 U.S. 911 (1972) 25

United States v. *Hall*, Dkt. No. 74-1938 (2d Cir., June 24, 1975) 21

United States v. *Ianelli*, 461 F.2d 483 (2d Cir.), *cert. denied*, 409 U.S. 980 (1972) 25

United States v. *Johnson*, 467 F.2d 630 (2d Cir. 1972), *cert. denied*, 410 U.S. 932 (1973) 18

PAGE

United States v. *Lane*, 514 F.2d 22 (9th Cir. 1975) 22

United States ex rel. Lewis v. *Henderson*, 520 F.2d 896 (2d Cir. 1975) 18

United States ex rel. Lopez v. *Zelker*, 344 F. Supp. 1050 (S.D.N.Y.), *aff'd without opinion*, 465 F.2d 1405 (2d Cir.), *cert. denied*, 409 U.S. 1049 (1972) 21

United States v. *Marrero*, 450 F.2d 373 (2d Cir. 1971), *cert. denied*, 405 U.S. 933 (1972) 18

United States v. *Masullo*, 489 F.2d 217 (2d Cir. 1973) 21

United States v. *Melendez*, 355 F.2d 914 (7th Cir. 1966) 26

United States v. *Messina*, 507 F.2d 73 (2d Cir. 1974) 20

United States v. *Ortega*, 471 F.2d 1350 (2d Cir. 1972), *cert. denied*, 411 U.S. 948 (1973) 18

United States v. *Parness*, 503 F.2d 430 (2d Cir. 1974) 25

United States ex rel. Robinson v. *Zelker*, 468 F.2d 159 (2d Cir. 1972), *cert. denied*, 411 U.S. 939 (1973) 20

United States v. *Schwarz*, 500 F.2d 1350 (2d Cir. 1974) 26

United States v. *Tucker*, 435 F.2d 1017 (9th Cir. 1970), *cert. denied*, 401 U.S. 976 (1971) 22

United States v. *Vasquez*, 476 F.2d 730 (5th Cir.), *cert. denied*, 414 U.S. 836 (1973) 21

United States v. *Weldon*, 384 F.2d 772 (2d Cir. 1967) 22

United States v. *Wisniewski*, 478 F.2d 274 (2d Cir. 1973) 25

Williams v. *New York*, 337 U.S. 241 (1941) 26

STATUTES CITED

PAGE

Federal Rules of Criminal Procedure, Rule 5(a) 18

Federal Rules of Criminal Procedure, Rule 35 3

Title 18, United States Code, Section 371 ..... 1, 27

Title 18, United States Code, Section 495 ..... 2, 27

Title 18, United States Code, Section 1708 2

Title 18, United States Code, Section 3501 19

United States Constitution, Amend. VI 19, 20, 21

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 75-1225

UNITED STATES OF AMERICA,

Appellee,

—v.—

THOMAS DUVALL and HENRY JONES,

Defendants-Appellants.

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

Henry Jones and Thomas Duvall appeal from judgments of conviction entered on June 16, 1975 in the United States District Court for the Southern District of New York after an eight-day trial before the Honorable Charles E. Stewart, Jr., United States District Judge, and a jury.

Indictment 74 Cr. 600, filed June 13, 1974, charged Henry Jones, Thomas Duvall and Raleigh McCoy Porter in Count One with conspiracy to possess stolen mail and to utter United States Treasury checks bearing forged endorsements. Title 18, United States Code, Section 371. In addition, Henry Jones was charged in Count Two with possession of stolen mail, in Count Three with uttering a forged Treasury check and in Counts Twenty-eight through Thirty-four with aiding and abetting Ra-

leigh McCoy Porter's possession of stolen mail. Title 18, United States Code, Sections 495 and 1708.

Thomas Duvall was charged also in Counts Four through Twelve and Count Twenty-four with possession of stolen mail, in Counts Thirteen through Twenty-one and Count Twenty-five with uttering forged Treasury checks, and in Counts Twenty-eight through Thirty-four with aiding and abetting Porter's possession of stolen mail.

Raleigh McCoy Porter was charged in Counts Twenty-two, Twenty-four, Twenty-six and Twenty-eight through Thirty-four with possession of stolen mail and in Counts Twenty-three, Twenty-five and Twenty-seven with uttering forged Treasury checks.

Hearings on the defendants' pretrial motions began on March 31, 1975 and concluded on April 21, 1975. Thereafter, and prior to selection of the jury, Counts Two, Nine, Eighteen, Twenty-two and Twenty-eight through Thirty-four were dismissed on the Government's motion. Accordingly, the defendants were tried for conspiracy and the following substantive counts: Jones, one count of uttering a forged Treasury check; Duvall, nine counts each of possession of stolen mail and uttering forged Treasury checks; Porter, two counts of possession of stolen mail and three counts of uttering forged Treasury checks.

Trial began on April 22, 1975 and concluded on May 2, 1975. Jones and Duvall were convicted on all counts in which they were charged. Porter was acquitted.

On June 16, 1975, Jones was sentenced to concurrent terms of three years imprisonment on Counts One and Three. He is presently serving his sentence.

Duvall was sentenced to three years imprisonment on Count One, execution of two years suspended, and probation for two years to begin on expiration of confinement. He was sentenced on the remaining counts to two years probation to run concurently with the probation imposed for Count One. On July 31, 1975, the Court filed an amended judgment under Rule 35, Federal Rules of Criminal Procedure, reducing Duvall's required imprisonment from one year to six months. The remainder of the sentence was undisturbed. Duvall is enlarged on bail pending this appeal.

Statement of Facts

The Government's Case

1. "The Prodigal Son"—The defendants' bad check business.

"The Prodigal Son" was a grocery store operated in Harlem during 1973 and 1974 by the defendants Thomas Duvall and Henry Jones, with the assistance of the defendant Raleigh McCoy Porter. But the premises at 168 Lenox Avenue were more than a mere provisionery. Under the guise of a legitimate Muslim grocery, the defendants dealt in stolen and forged United States Treasury checks and official City of New York checks. Their scheme was to pay suppliers with stolen and forged checks and to replace the checks with more "bad paper" if the supplier returned for cash to make good the original check.

Testimony by the payees of the checks established that the checks had been stolen from the mail or, in one case, from a locker, and that the checks did not bear their signatures as endorsements. (Tr. 509-555).

In the first installment of proof of the defendants' illegal scheme, the government established that in 1972 Henry Jones operated a restaurant called the "Shabazz Steak and Take." (Tr. 47). A bread supplier, Louis Albanese, testified that he had received a Treasury check for $317.90 payable to Benjamin Wachholder in partial payment of Jones' mounting bread bill.* Jones signed the alias "Robert Scott" to the rear of the check and gave it to Albanese, who returned all but $60 or $70, which he credited against the bread bill. (Tr. 48-55; GX 1). The payee testified that he had not endorsed nor authorized endorsement of the check, which had been stolen from him in New York in August, 1972. (Tr. 511).

When the check was returned unpaid to Albanese from the bank as stolen, he set out to look for Henry Jones. By that time the Steak and Take had closed, but he found Jones at a new establishment, The Prodigal Son, at 168 Lenox Avenue. There he confronted Jones with the Wachholder check and several New York City welfare checks which he had received from Jones and which had also been returned as stolen. Jones claimed that he had no responsibility for the returned checks because he was no longer in business at the Steak and Take, but agreed to look into the matter when Albanese pressed him. Although Albanese thereafter left copies of the returned checks with persons at The Prodigal Son, he never heard from nor saw Jones again. (Tr. 56-59).

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* Although Albanese testified that this occurred within thirty days of the date of the check in June, 1972, it is clear from the date of Albanese's bank deposit in September, 1972, and the testimony of the payee that Albanese received the check in August, 1972. Mr. Wachholder, a Massachusetts resident, testified that the check had been stolen from his suitcase which had been left in a locker at the Times Square subway station on August 27, 1972. (Tr. 510).

While Jones was passing stolen checks as proprietor of Shabazz Steak and Take, Thomas Duvall had been busy at the Nile Food Market, a predecessor tenant of The Prodigal Son at 168 Lenox Avenue. Duvall's business involved ordering groceries at Bronx Terminal Market and also paying for them with stolen Treasury checks. Thus, in September, 1972, he passed such a check to Sam Palatnik, proprietor of Schneider & Held, Inc. a wholesale grocer. The Treasury check was payable to Louis Gluck, bore a forged endorsement, and had been stolen from the mail. (Tr. 129, 516; GX 2). About a year later, when Palatnik confronted Duvall with the returned check, Duvall claimed he would make it good with cash. Palatnik never saw Duvall again, despite the fact that they had done business together previously for more than two years. (Tr. 130).

In October, 1972, Raleigh McCoy Porter paid for a shipment of soda at The Prodigal Son with a forged Treasury check payable to Robert L. Council. When the recipient of the check, a soft drink route man named Walter Meachem, returned the bounced check he was reimbursed in cash by Thomas Duvall. (Tr. 156, 158, 518; GX 3).* Then, in early 1973, another soft drink delivery man, Fred Whittington, also received a stolen New York City welfare check in payment for the soda bill at The Prodigal Son. When the check was returned unpaid Whittington sought reimbursement. Although he found The Prodigal Son boarded up, Whittington noticed activity across the street at "Your Bakery," 163 Lenox Avenue. There he found the proprietor, Thomas Duvall, using the alias "Benjamin Young." The two began to argue over reimbursement, but Henry Jones was also present and ended the discussion by giving Whittington a personal check to cover the returned welfare check. (Tr. 104, 105). Jones' check bounced.

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* Duvall was not charged in connection with this check; Porter was acquitted of knowingly uttering it as a forged instrument.

When Whittington returned to Your Bakery to have Jones' check covered, he argued with Jones, and "Benjamin Young" (Duvall) gave him a stolen and forged United States Treasury check in payment of the soda bill. The check, in the amount of $28.00, was payable to James E. Wilson. To the forged endorsement Duval added "Benjamin Young, 163 Lenox Avenue" in his own handwriting. (Tr. 106, 107, 527; GX 4). When that check was returned unpaid as stolen, Whittington returned once again to Your Bakery, but found it closed. By this time the defendants were back in business at The Prodigal Son across the street. Whittington gave the Wilson check to Raleigh McCoy Porter, who was working at the counter in the store, and Porter took it to Duvall who was at the rear. Porter returned with a note and a five dollar bill. (Tr. 108). Thereafter, when Whittington tried to obtain the remainder due him for the stolen Treasury check, he found that The Prodigal Son was again boarded up. (Tr. 113).

The month after Whittington received the Treasury check from "Benjamin Young," Duvall, using the same alias, deposited three stolen and forged Treasury checks, totalling more than $450.00, in a checking account he kept under that name at a Chemical Bank branch in the Bronx (Tr. 175-186, 529-539; GX 6, 10). A photograph taken at the time Duvall made the deposit was introduced into evidence at trial (GX 5), as was expert testimony that he could have written the "Benjamin Young" second endorsements. (Tr. 578). After his arrest, however, when confronted with one of the checks he had deposited with the "Benjamin Young" second endorsement, payable to Coreen Ronan, Duvall denied having used the alias, and denied knowing anything about the check. (Tr. 662-664). At the time of his arrest Duvall had in his possession two pawn tickets bearing the name "Young" (Tr. 480; GX 33, 34).

In June, 1973 a truck driver, Elijah Buel, received a stolen and forged Treasury check in the amount of $159.40, payable to Peter Bucenko, from Raleigh McCoy Porter. (Tr. 225, 543; GX 11). This check also bore Henry Jones' palmprint. (Tr. 380-386). Porter was directed by Thomas Duvall to use the check to pay Buel for the soda bill owed to his employer, Hiram Miranda. (Tr. 229).* When the check was returned as stolen, Buel went to 168 Lenox Avenue with that check and a number of welfare checks which had been received and returned under similar circumstances. When Buel told Duvall he wanted cash to cover the forged Treasury check and the stolen and forged welfare checks, Duvall told him that the store did not deal in cash, but only in checks. "The bookkeeper" was in Chicago, according to Duvall, and he would get a certified check for Buel when he returned. But Buel would not wait and took another welfare check to cover the Treasury check. (Tr. 231). Next, Buel's employer, Hiram Miranda, went to The Prodigal Son with some returned welfare checks. Raleigh McCoy Porter told him to return in a week to get a certified check. (Tr. 311).

In September, 1973 Miranda and Buel returned to 168 Lenox Avenue to try to obtain cash for all the returned checks. (Tr. 232, 312). Henry Jones, whom Miranda had known for several year as "Brother Henry", was at the store, and with Duvall he gave Miranda two more welfare checks in order to cover the other checks. (Tr. 314). This time it was Jones who told them that the grocery store had no cash but dealt only in checks; he convinced Miranda to take the replacement welfare checks. (Tr. 313, 314). After Miranda accepted the checks he was unable to contact Jones or Duvall again; the store was always closed. (Tr. 315).

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* Duvall was convicted of possessing (Count Twenty-four) and uttering (Count Twenty-five) this check. Porter was acquitted of those counts.

Several months later, in May, 1974, at The Prodigal Son Thomas Duvall presented three stolen and forged Treasury checks to Irving Holtzman, a carpet store owner, in payment for carpeting Duvall's apartment. (Tr. 331-335; GX 15-17). Two of the three checks bore endorsements that were probably forged by Duvall; the other contained numbers probably written in Duvall's handwriting. (Tr. 589).

2. Duvall's pretrial statements.

On the afternoon of June 3, 1974, Thomas Duvall was arrested pursuant to a warrant. After being handcuffed and placed in a Secret Service car he was advised of his rights and driven to the Secret Service offices at 90 Church Street. There he was subjected to a brief strip-search, advised of his rights again, fingerprinted and photographed. (Tr. 409-413, 474-482). After he had signed a written waiver of his right to remain silent and his right to counsel Duvall agreed to speak with Agent Gniazdowski. (Tr. 413-415; GX 31). He told Gniazdowski that he was the president of The Prodigal Son and that he had paid suppliers both in cash and in Treasury checks. (Tr. 662). Duvall denied having heard the name "Coreen Ronan," and when shown the Ronan check (GX 8), he denied having ever seen it and denied having signed or ever used the name "Benjamin Young" endorsed on the back of the check. (Tr. 664).

Following the fifteen minute interview (Tr. 673), Duvall was taken to the Federal Detention Headquarters at West Street to be lodged for the night. (Tr. 673). The next morning Secret Service agents escorted him to the Secret Service offices so that his property could be returned. (Tr. 673). Duvall was then taken to the office of Assistant United States Attorney Michael Q. Carey. There, after having been advised of his rights, Duvall

again said he was president of The Prodigal Son and that he had paid suppliers with cash or welfare checks on occasion, but never with Treasury checks. He also denied having paid Holtzman Carpet with anything but cash. (Tr. 680). After that 40-minute interview Duvall waited outside Carey's office while Jones and Porter were interviewed, and he was then taken to the Magistrate for arraignment.

The Defense Case

Raleigh McCoy Porter presented no evidence.

Thomas Duvall presented the brief testimony of Secret Service Agent William Schwarick, a Government witness, to the effect that following Duvall's arrest the agents had seized pills bearing a Doctor Shapiro's name, that Schwarick had been present during the arrest and handcuffing of Duvall, and that he and Agent Gniazdowski had not used the "good guy bad guy" interrogation technique with Duvall. (Tr. 775-778).

Henry Jones presented the character testimony of Deputy United States Marshall Robert White, who said that Jones enjoyed a good reputation in the community as an honest and reputable business. (Tr. 762). On cross-examination, White revealed that he did not even know Jones' name, and that although he had spoken with other people in the community he had not heard of Jones' arrest on state charges of conspiracy, possession of stolen property, forgery, criminal possession of a forged instrument and grand larceny. (Tr. 772).

ARGUMENT

POINT I

Duvall's motion to suppress his pretrial statements was properly denied.

Duvall claims on appeal, as he did at trial, that the pretrial statements he made to Secret Service agents and an Assistant United States Attorney were not voluntary. He claims that his will was overborne and that his waiver of his right to counsel and to remain silent was not voluntary and was also the product of a delayed arraignment. In addition, he relies on the unsupported and erroneous assertion that *Massiah* v. *United States*, 377 U.S. 201 (1964) prohibits the authorities from engaging in prearraignment questioning of a defendant who is arrested on a Magistrate's warrant. None of Duvall's arguments has merit.

1. The arrest and ensuing statements.

At about 3:00 P.M. on June 3, 1974, Secret Service Agent Gniazdowski filed a sworn complaint with a United States Magistrate for the Southern District of New York, charging Duvall with a violation of Title 18, United States Code, Section 495. A warrant issued, and Gniazdowski left the Court House at about 3:30. (H 1527).* As he drove toward The Prodigal Son in Harlem, Gniazdowski informed other agents that the arrest warrants for Jones, Duvall, Porter and Kenneth Jodan** had issued. (H 1527). This information reached Secret Service agents who were following Duvall's car. The agents stopped Duvall at 135th Street and Madison Avenue and

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* "H" refers to pretrial hearing minutes; "HX" refers to the hearing exhibits.

** Jodan remains a fugitive.

arrested him pursuant to the warrant. (H 1578). All of the agents were armed; several pointed handguns at Duvall and Agent Schwarick pointed a shotgun at him and ordered him to leave the car. When he did not comply, Agent Vezeris nudged Duvall from the passenger's side of the car. (H 1579). The passenger, an unidentified man who was not arrested, had been removed from the car by Agent Chodosh. (H 1463).

Agent Schwarick quickly patted Duvall's clothing in a frisk for weapons, then handcuffed him and placed him in the back seat of a Secret Service car. At that point Duvall asked what was going on, and Schwarick informed him that he had been arrested on a warrant by Secret Service Agents, and he showed Duvall his credentials. (H 1581). Schwarick also informed Duvall that he had been arrested for passing forged Teasury checks, that he had the right to remain silent, that anything he said could be used against him, and that he had the right to the assistance counsel, appointed if he could not afford an attorney. (H 1581). Duvall then put his head back on the seat and said nothing during the ride to the Secret Service office at 90 Church Street. No attempt was made to question him at that time. (H 1582).

The agents arrived at their office shortly after 4:00 P.M. and escorted Duvall to an interview room on the eighth floor. There Duvall's handcuffs were removed, and he was directed to empty his pockets and to remove his clothes for a brief strip-search.* After this search, Agent Schwarick directed Duvall to get dressed, and Agent Chodosh left the room to obtain forms with which to process Duvall as a prisoner. (H 1466, 1584). Those forms included an advice of rights and waiver form and

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* This procedure was necessary to insure that Duvall had no weapons on his person which had been missed during the earlier pat-down. (H. 1582)

a handwriting exemplar form. Meanwhile, Schwarick examined the contents of Duvall's pockets, which had been placed on the desk, and he found two pawn tickets bearing the name "Young". (HX 34, 35; H 1584). When Chodosh returned, Schwarick reminded him to put his handgun and holster away so that Duvall would not be confronted with any firearms in the office. (H 1466, 1586). Duvall was never subjected to interrogation or any processing at gunpoint. (H 1587).

Chodosh returned and read the warning of rights form to Duvall, had Duvall read it, asked if he understood it, and requested him to sign the waiver if it was appropriate. (H 1467). Duvall did so at 4:20 P.M., indicating that he understood all of his rights but did not wish to exercise them. (HX 33). No interview was conducted at that time.

Shortly after 5:00 P.M., Agent Gniazdowski, who was in charge of the investigation, returned to the office after the arrest of Jones and Porter at 168 Lenox Avenue. He visited the room where Duvall waited with Agent Chodosh, identified himself to Duvall, and orally advised him of his rights. He told Duvall he would speak with him later, gave Duvall a cup of coffee, and then left to speak with the other prisoners. (H. 1529, 1530). Meanwhile, Duvall completed the handwriting exemplar form and was taken to another room to be photographed and fingerprinted. (H. 1471, 1530). After that procedure, Duvall was taken to a large "squad room" which was filled with agents' desks. There, at about 6:15, he was interviewed by Gniazdowski in the company of several other agents and Postal Inspectors. (1530, 1531).

Gniazdowski reminded Duvall that the rights he had been advised of still held, and Duvall agreed to be questioned. (H. 1530). He then asked Duvall specific questions, which resulted mostly in false statements in which

Duvall denied having used the name "Benjamin Young," denied having negotiated the Coreen Ronan check, and claimed he used mostly cash to pay his bills. Duvall gave very few statements which inculpated him, limiting his admissions to an explanation of his connection with The Prodigal Son. (H. 1534-1540). The entire interview lasted ten or fifteen minutes (H. 1531).*

After all the processing was completed, Duvall was taken to the Federal Detention Headquarters at West Street, where he was lodged for the night. (H. 1532). He arrived at about 7:30 P.M. and was released to Secret Service Agents the next morning for arraignment at 11:00 A.M. (HX. 19). Although he missed the dinner hour, he was on the premises for breakfast, and had the opportunity to eat on the morning of June 4th. (H. 1001).

On June 4, 1974, at about 11:30 A.M. the agents brought Duvall, Jones and Porter to the Secret Service offices for the sole purpose of returning their personal property. No interviews were conducted, and the defendants were then brought to the United States Attorney's Office for pre-arraignment interview. (H. 1077, 1533). Duvall was the first to be interviewed by Assistant United States Attorney Carey at about noon. The interview lasted about 45 or 50 minutes.

Initially, Mr. Carey advised Duvall of his rights from a form used for that purpose. (HX. 32; H. 1280, 1281). He recorded Duvall's responses to the advice of his rights, obtained pedigree information, and then took a statement.

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* Duvall's counsel cleverly intimated in a question to Gniazdowski that the interview had consumed two hours (H 1536), and he erroneously adopts a figure in excess of an hour before this Court. (Duvall Brief, 10). However, the record is abundantly clear that the interview with Duvall was no more than ten or fifteen minutes in duration (H 1531), and indeed the defendant himself so testified. (H 1777).

(H. 1281). In that statement, as noted earlier, Duvall lied about his methods of payment to Holtzman Carpet and other suppliers, but did admit his connection with The Prodigal Son. (Tr. 680). Mr. Carey testified that he *might* have mentioned to Duvall that if he cooperated Duvall would be permitted to plead to a felony count or counts and that the cooperation would be called to the attention of the sentencing judge. (H. 1321). Mr. Carey further stated that although he did not recall specifically, he might have mentioned the possible maximum sentence for the one count for which Duvall had been arrested—ten years. (H. 1309). He also advised Duvall of the charges against him and that he was to be taken to the Magistrate, who would fix bail. (H. 1324).

After the interview was completed and Mr. Carey had spoken with the other defendants, Duvall was arraigned and counsel was appointed at about 2:15 P.M. Prior to arraignment, Duvall did not decline to be interviewed, did not request counsel, did not request food, and made no other requests of the agents or Mr. Carey.

2. Duvall's testimony.

Duvall testified at the suppression hearing and also furnished an affidavit he had signed and affirmed under penalties of perjury. When confronted with the document, however, Duvall claimed that his attorney and Raleigh McCoy Porter had prepared it; though Duvall claimed it was true, he testified at obvious variance with its contents. (HX. 37; H. 1708, ff.).

In brief, Duvall's testimony was that he had been arrested at gunpoint, as described above, and had been in fear of his life. (H. 1717). However, he also claimed that he had noted the exact time on the clock in his car (H. 1703, 1704) and had observed precisely what was done with his passenger, even though he had followed

the agents' orders to freeze and look straight ahead. (H. 1709, 1711). He testified further that after he was patted down and placed in the Secret Service car he was not advised of his rights, and that one (and only one) pocket of his jacket was searched at that time (H. 1739, 1740). The agents had denied any such search. Duvall admitted, however, that he had made no statements during the car ride to the Secret Service offices, and he agreed that after the strip-search he had read and understood each item on the warning and waiver of rights form. He claimed that he signed it, however, because he believed he would be released if he did. (H. 1740, 1764-1769). Duvall also testified that although he had affirmed in his affidavit that he was searched in the office at gunpoint, in truth there were no guns pointed at him in the office. (H. 1757). He also agreed with Gniazdowski's account of their interview, and testified that it took no more than ten minutes (H. 1777). However, Duvall claimed also to have been interviewed by another agent, whom he referred to as a "so-called American Negro" (H. 1777, 1780).*

Duvall testified that he had arrived at West Street too late for dinner, that he had not slept all night, but that he had dozed off just at about the time the other 23 men in his area were leaving for breakfast. (H 1691, 1792-1794). He claimed not to have had any food at that point or later in the day, despite his obvious opportunity to have eaten. (H 1796).

Although Duvall remembered leaving West Street on the morning of June 4th, he did not recall having gone to the Secret Service offices for the return of his property. Rather, he said, he, Jones and Porter were taken to the

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* Duvall said he had spent thirty minutes discussing the Muslim religion with this man. (H 1780). If this interview actually occurred it is clear that Duvall spoke freely and voluntarily at *that* time.

courthouse, where he knew "all the time" he was to be arraigned. (H 1804). He also testified that he understood what arraignment was, and indeed, he defined it perfectly during cross-examination (H 1818). Duvall also admitted that Mr. Carey had advised him of all the rights on the U.S. Attorney's form, and that he had understood those rights and the charges against him. (H 1806-1811). He also knew that he was in a prosecutor's office, and not in the courtroom before a judge. (H 1812). Nonetheless, claimed Duvall, he only gave information to Carey because he thought Carey would "help" him and because he was afraid he faced a 100-year sentence. (H 1813). He testified also that he had a heart condition, and that he had informed Mr. Carey of that fact. However, he did not tell his appointed attorney or the Magistrate anything about it at the time of arraignment. (H 1820).

In sum, Duvall claimed that he gave information after having been advised of his rights only because he was afraid, and/or expected to be released. Of course, most of the information he gave in response to those feelings was false and obviously intended by him to be exculpatory.

3. The Trial Court's ruling.

In denying Duvall's motion to suppress the statements made to Gniazdowski and Carey, Judge Stewart found that the delay between arrest and arraignment under the circumstances was not "unnecessarily long," citing *United States* v. *Collins*, 462 F.2d 792 (2d Cir.), *cert. denied*, 409 U.S. 988 (1972). (H 1870). The Court ruled that although Duvall may have been frightened, he was not "so overwhelmed by the presence of guns that . . . he was punch drunk," as Duvall's counsel had claimed (H 1870). The Court held further that Duvall

had been advised properly of his rights in the Secret Service car, at 90 Church Street, and by Mr. Carey, that he was fully aware of his rights, and that he had understood why he had been arrested (H 1870, 1971). In addition, the Court held that Duvall had voluntarily waived his rights prior to making the statements in question (H 1873).

4. Duvall's pre-trial statements were voluntarily made.

Duvall's claims of involuntariness are without merit. Although he was arrested at gunpoint, and the Secret Service admittedly made a show force at the scene of arrest, it clear that all of the statements he gave were rendered hours later in an office, in the absence of any physical or mental coercion, and the next day at the U.S. Attorney's office, again without any such coercion. There was no interview at the scene of arrest, nor in the Secret Service car where Duvall sat in handcuffs. Rather, the first interview occurred about an hour after he arrived at the Secret Service office, after he had been thrice advised of his rights and after he had read and signed a written waiver. (GX 31).

Duvall was first orally advised of his rights in the Secret Service car. After the brief strip-search at the office he was read and indeed read himself the warning and waiver of rights form supplied by Agent Choronosh. He admitted that he understood everything he had read, and that he had signed the form with the understanding that it meant he did not want a lawyer at that point. (H 1768). While he claimed that he thought the "waiver" was a waiver of judicial proceedings, and that he would be released (H 1766), that claim is belied both by the contents of the form, which Duvall admittedly understood, and by the fact that he testified he knew all along

that the ultimate result of all of the procedure would be his going to court for arraignment. (H 1804). Duvall was fully advised of his rights before making any statements, *Miranda* v. *Arizona*, 384 U.S. 474 (1966), and he voluntarily waived those rights, as the Court below held. Indeed, it is important in this connection to note that almost everything Duvall said to the authorities following arrest was designed by him to be exculpatory and was principally false, hardly reflecting the statements of a man coerced into a "confession." *Compare United States ex rel. Lewis* v. *Henderson*, 529 F.2d 896 (2d Cir. 1975), and cases cited therein.

Nor were the statements to the Secret Service or Mr. Carey the products of a delayed arraignment. There was no "unnecessary delay" here between arrest and arraignment as proscribed by Rule 5(a), Federal Rules of Criminal Procedure, and *Mallory* v. *United States*, 354 U.S. 449 (1957). While the hiatus was almost twenty-four hours, the time was consumed by processing the defendant at the Secret Service office, transporting to West Street, a brief return to the Secret Service office for a return of personal property, transportation to the courthouse, the interview with Mr. Carey, and arraignment. This Court has repeatedly recognized that processing, transportation, overnight lodging and pre-arraignment interviews are delays which are neither unreasonable nor "unnecessary" within the meaning of *Mallory*, *supra*, or 18 U.S.C. § 3501. *United States* v. *Collins*, 462 F.2d 792 (2d Cir.), *cert. denied*, 409 U.S. 988 (1972); *United States* v. *Ortega*, 471 F.2d 1350, 1362 (2d Cir. 1972), *cert. denied*, 411 U.S. 948 (1973); *United States* v. *Marrero*, 450 F.2d 373 (2d Cir. 1971), *cert. denied*, 405 U.S. 933 (1972). *See also United States* v. *Johnson*, 467 F.2d 630, 635-637 (2d Cir. 1972), *cert. denied*, 410 U.S. 932 (1973). Accordingly, the statements made by Duvall

to Agent Gniazdowski and Mr. Carey were not the product of an unnecessary period of pre-arraignment delay.

Given the statutory requirements of 18 U.S.C. § 3501,* as well as the principles announced in *Miranda* v. *Arizona*, *Mallory* v. *United States*, both *supra*, and their progeny, the Court below correctly denied Duval's motion to suppress.

5. There was no violation of Duvall's Sixth Amendment right to counsel.

Duvall also argues that his *Miranda* waiver was ineffective because the filing of a complaint and issuance of a warrant constituted the commencing of a criminal proceeding, making the statements he gave in the absence of

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* The applicability of Section 3501 here is open to question because by items terms it applies only to "confessions", defined in Section 3501(e) as "any confession of guilt of any criminal offense or any self-incrimirating statement made or given orally or in writing." Even assuming its applicability to the very few statements by Duvall which could in any way be considered inculpatory, however, the trial Court's ruling is correct under all of the circumstances here, including the provisions of Section 3501 (b); which were addressed in a memorandum furnished the Court during the suppression hearing:

> (1) the time elapsing between arrest and arraignment of the defendant making the confession, if it was made after arrest and before arraignment;
>
> (2) whether the defendant knew the nature of the offense with which he was charged or of which he was suspected at the time of making the confession;
>
> (3) whether the defendant was advised or knew that he was not required to make any statement and that any such statement could be used against him;
>
> (4) whether the defendant had been advised prior to questioning of his right to the assistance of counsel; and
>
> (5) whether the defendant was without the assistance of counsel when questioned and when giving the confession.

counsel inadmissible under *Massiah* v. *United States*, 377 U.S. 201 (1964). This contention is without merit.

In *Massiah* the Court held that the deceptive and clandestine post-indictment interrogation of the defendant, without warnings of any sort or notice to his counsel, violated the Sixth Amendment and precluded the use of the admissions so secured as evidence at trial. However, it is settled that Sixth Amendment rights do not attach until the initiation of "adversary judicial proceedings". *Kirby* v. *Illinois*, 406 U.S. 682, 688-690 (1972). While in *United States ex rel. Robinson* v. *Zelker*, 468 F.2d 159, 160-163 (2d Cir. 1972), *cert. denied*, 411 U.S. 939 (1973), this Court held, with Judge Hays dissenting, that, given the specific provisions of New York law, the filing of a complaint before a magistrate and the issuance of a warrant constituted the initiation of adversary judicial proceedings within the meaning of *Kirby*, the author of *Robinson* subsequently suggested that the same action in a federal context might not trigger the operation of the Sixth Amendment. *United States* v. *Counts*, 471 F.2d 422, 425 & n.4 (2d Cir.), *cert. denied*, 411 U.S. 939 (1973). The question left open in *Counts* was answered in *United States* v. *Messina*, 507 F.2d 73 (2d Cir. 1974) (Friendly, C.J.), in which this Court held that the filing of a complaint charging a federal crime, the issuance of an arrest warrant and its execution do not cause Sixth Amendment rights to attach.* Thus,

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* In *Messina* the defendant had been arrested on a warrant issued by a United States Magistrate. After arrest but prior to arraignment, Messina had consented to give the agents two stolen sweaters he had at his home; after arraignment and the appointing of counsel, the agents took Messina home and collected the sweaters. A claim that this violated Messina's Sixth Amendment rights was dismissed on the ground that ". . . Messina had given his consent before the criminal prosecution had begun and Sixth Amendment rights had attached under *Kirby* v. *Illinois*, *supra*, 406 U.S. at 690 . . ." 507 F.2d at 77.

the necessary predicate for Duvall's *Massiah* claim is lacking.*

Moreover, even assuming that Duvall's Sixth Amendment rights had attached at the time of the filing of the complaint and the issuance of the arrest warrant, his waiver of his right to remain silent and to the assistance of counsel after repeated *Miranda* warnings was entirely sufficient and effective to support admission of his post-arrest statements. *United States* v. *Diggs*, 497 F.2d 391 (2d Cir.), *cert. denied*, 419 U.S. 861 (1974); *United States* v. *Barone*, 467 F.2d 247, 249 (2d Cir. 1972).** See also *United States* v. *Crisp*, 435 F.2d 354 (7th Cir. 1970), *cert. denied*, 402 U.S. 947 (1971); *United States*

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* The *Massiah* claim also fails for the additional reasons that Duvall was not under indictment, was not represented by counsel at the time his statements were made, was not deceptively interrogated and had been repeatedly advised of his rights. *United States* v. *Ramirez*, 482 F.2d 807, 815-816 (2d Cir. 1973).

** Although only *Barone*, and not *Diggs*, involved post-indictment interrogation, *Diggs* is entirely apposite here. In *Diggs* adversary judicial proceedings had commenced in the state court with respect to the same crim about Diggs was questioned by federal agents. The Court accordingly found inapplicable the rule that Sixth Amendment rights apply only to a specific pending charge, e.g. *United States* v. *Hall*, Dkt. No. 74-1938 (2d Cir., June 24, 1975), slip op. at 4349 n.4, *United States* v. *Masullo*, 489 F.2d 217, 221-224 (2d Cir. 1973), *United States* v. *Dority*, 487 F.2d 846 (6th Cir. 1973), *United States* v. *Vasquez*, 476 F.2d 730 (5th Cir.), *cert. denied*, 414 U.S. 836 (1973), and held that Diggs' Sixth Amendment rights had attached with respect to the crime about which the agents sought to question him. The Court went on to find, however, that since Diggs had talked to the agents after being warned of his *Miranda* rights, the District Court's "finding of waiver is fully justified." 497 F.2d at 393. Duvall's argument from supposed intimations to the contrary in *United States ex rel. Lopez* v. *Zelker*, 344 F. Supp. 1050 (S.D.N.Y.), *aff'd without opinion*, 465 F.2d 1405 (2d Cir.), *cert. denied*, 409 U.S. 1049 (1972), ignores both this Court's holding in *Diggs* and the fact that *Diggs* specifically distinguished *Lopez* on factual grounds which warrant the taking of the same distinction here. 497 F.2d at 393 n.3.

v. *Tucker*, 435 F.2d 1017 (9th Cir. 1970), *cert. denied*, 401 U.S. 976 (1971); *United States* v. *De Loy*, 421 F.2d 900 (5th Cir. 1970).

POINT II

There was more than ample evidence to sustain the jury's verdict.

Henry Jones claims that the evidence was insufficient to support his conviction for conspiracy (Count One) and uttering a forged Treasury check (Count Three). The contention is without substantial merit.

The Government's proof established that Henry Jones shared proprietary duties with Thomas Duvall at The Prodigal Son—a "grocery store" which dealt only in checks. Moreover, the evidence made clear the fact that Jones was a full partner with Duvall in the scheme to utter forged Treasury checks.

Jones' first proven connection with such a check was in August, 1972 at his own establishment, the "Shabazz Steak and Take" at 540 Lenox Avenue. There, as charged in Count Three, he passed a stolen and forged Treasury check to the bread supplier, Louis Albanese.* Not only was the endorsement of the payee forged, but Jones personally signed the alias "Robert Scott" to the check as a second endorsement, in an obvious effort to defraud the

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* The variance between the June date charged in the indictment and the September date proved at trial is not, as Jones claims, fatal. Both dates were well within the statute of limitations, and Jones makes no showing or claim that the preparation of his defense was prejudiced in any way. *United States* v. *Weldon*, 384 F.2d 772, 774 (2d Cir. 1967); *United States* v. *Edelman*, 414 F.2d 539 (2d Cir. 1969), *cert. denied*, 396 U.S. 1053 (1970). See *United States* v. *Lane*, 514 F.2d 22, 25 (9th Cir. 1975).

Government and any bank which might accept the stolen check. (Tr. 55). This use of a phony name for second endorsement, conclusive evidence that Jones passed the check with full knowledge of the illicit character, was also practiced by Duvall, who used the name "Benjamin Young" on several of the stolen and forged checks which he passed.

While Jones in August, 1972, was not employed at The Prodigal Son, he was no stranger to the stolen and forged check routine practised there. Later, when Albanese fortuitously found Jones at The Prodigal Son, he confronted Jones not only with the Wacholder Treasury check, but also with several stolen and forged welfare checks that he had received from Jones for the bread bill at the Steak and Take. (Tr. 57). Jones' reaction was a total disclaimer of responsibility, and a desire to have Albanese surrender the original checks to him. Albanese was not that foolish, and he left only copies of the checks for Jones at The Prodigal Son. Although Jones had known Albanese for several years, and knew where his route and place of business were, Albanese never heard from Jones with respect to the checks. These were hardly the actions of the honest and reputable businessman Jones' character witness claimed to know.

Jones' knowledge that the Wacholder check was forged is well established by his actions, and indeed by the check itself. (GX 1). The check was in the amount of $319.70, payable to a man in Andover, Massachusetts, bearing a June, 1972 date. It is difficult, if not impossible, to believe that Jones obtained the check at the Steak and Take under lawful circumstances. Moreover, he found it necessary to sign a phony name as second endorsement, obviously knowing that when the check was returned unpaid it would not reflect his name as an endorser and, in any event, that he would be gone from that place of business.

Jones' check passing activities did not end with that one check. In early 1973 Fred Whittington, a soda deliveryman, had received a stolen welfare check at The Prodigal Son. When Whittington confronted Duvall over the check at "Your Bakery" at 163 Lenox Avenue, The Prodigal Son being boarded up that day, it was Jones who gave Whittington in exchange a personal check which was shortly returned unpaid. Indeed, Jones knew at the time he gave it to Whittington that it was not backed by funds because he later claimed to have told Whittington as much. (Tr. 106). In order to end that argument, Duvall gave Whittington the stolen and forged James Wilson Treasury check. All of this took place with Jones' obvious agreement and participation, and the proof is thus quite clear that Jones and Duvall were engaged in the very scheme charged in the indictment: the passing of stolen and forged Treasury and welfare checks and their replacement with more such checks upon their return by the victimized merchants.

Further evidence reflecting Jones' guilty knowledge and participation is supplied by the testimony of Hiram Miranda, a soda distributor, and his driver, Elijah Buel. In June, 1973, Miranda had sent Buel to The Prodigal Son to get cash to cover some returned welfare checks. However, he received the forged Peter Bucenko Treasury check instead, from Raleigh McCoy Porter at Duvall's direction; the check bore Jones' palmprint. Later Miranda himself went to the store to get reimbursement, and Porter assured him he would receive a certified check within a week. The next week Miranda sent Buel to get that check, but he was assured by Thomas Duvall that the business had no cash, that the store dealt only in checks, and that a certified check would be forthcoming when the "bookkeeper" returned from Chicago. Rather than press the issue, however, Buel accepted another welfare check. Finally, in September 1973 Miranda and Buel returned to the store to confront

the owners. Miranda found Henry Jones, whom he had known from the Shabazz Steak and Take (Tr. 308, 318). It was Jones who explained that the returned checks could not be covered with cash because the store had only checks available. Accordingly, Miranda accepted two more welfare checks from Jones and Duvall to cover the Bucenko Treasury check and the other welfare checks which had been returned.

Thus, it is clear that Jones and Duvall were well immersed in the forged check business. Coupled with the evidence of his participation in the transactions with Albanese and Whittington, Jones' knowledge of the forged nature of the checks in which he was dealing was clear. These were not isolated incidents of store owners inadvertently accepting stolen or forged checks over the counter at their place of business. Rather, the evidence showed Jones' and Duvall's systematic practice of trading in stolen and forged Treasury and welfare checks. Jones was not a mere bystander, as he argues on appeal. He was a willing participant in The Prodigal Son's check replacement business. The proof at trial showed a pattern of conduct and dealing between the defendants which unambiguously established the existence of the conspiracy charged in the indictment. *United States* v. *Ianelli*, 461 F.2d 483, 486-487 (2d Cir.), *cert. denied*, 409 U.S. 980 (1972); *United States* v. *Fried*, 464 F.2d 983 (2d Cir.), *cert. denied*, 407 U.S. 911 (1972); *United States* v. *Cassino*, 467 F.2d 610, 617-618 (2d Cir. 1972), *cert. denied*, 410 U.S. 928 (1973). *See also United States* v. *Parness*, 503 F.2d 430, 437-438 (2d Cir. 1974); *cf. United States* v. *Wisniewski*, 478 F.2d 274, 279-280 (2d Cir. 1973). Accordingly, the evidence is more than sufficient to sustain the verdict here.

POINT III

The Trial Court's sentence of Jones was lawful and proper in every respect.

Jones' final complaint is that the District Court abused its discretion in sentencing him to three years imprisonment while Duvall received only six months imprisonment and probation. Jones also claims that his sentence was based solely on the fact that he had refeused to cooperate with the United States Probation Office. These contentions are frivolous.

Sentencing, of course, is indivdiual. *Williams* v. *New York*, 337 U.S. 241 (1941). Duvall's sentence is utterly irrelevant *vis-a-vis* Jones'. *See United States* v. *Melendez*, 355 F.2d 914, 917 (7th Cir. 1966). In sentencing Jones Judge Stewart obviously considered him as an individual and did not apply a fixed or mechanical sentencing formula. *Compare United States* v. *Schwarz*, 500 F.2d 1350 (2d Cir. 1974). Rather, the Court sentenced Jones in light of the evidence presented at trial and at the pretrial suppression hearings. (S. 37-39, 40).* Moreover, the Court specifically rejected any suggestion that he had imposed punishment for Jones' refusal to cooperate with the Probation Office but merely pointed out the difficulty of sentencing a man who had not furnished any information about himself, mitigating or otherwise. (S. 40, 41).**

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* "S" refers to the minutes of the sentencing, June 16, 1975.

** Judge Stewart specifically invited Jones to speak with Probation after sentencing and file a motion for reduction of sentence. Jones not only failed to speak with Probation, but even failed to surrender to begin serving his sentence. He had to be arrested pursuant to a bench warrant.

In any event, the sentence was well within the statutory maximum, 18 U.S.C. §§ 371, 495, and does not represent an abuse of the court's discretion in sentencing, or the judicial process by which sentence was imposed. *Dorszynski* v. *United States*, 418 U.S. 424 (1974).

CONCLUSION

The judgments of conviction should be affirmed.

Respectfully submitted,

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AFFIDAVIT OF MAILING

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

T. BARRY KINGHAM being duly sworn, deposes and says that he is employed in the office of the United States Attorney for the Southern District of New York.

That on the 26th day of November, 1975 he served 2 copies/~~of~~ each the within brief by placing the same in a properly postpaid franked envelope addressed:

Jesse Berman, Esq.
351 Broadway
New York, NY 10013

O.T. Wells, Esq.
Suite 1200
350 Broadway
New York, NY 10013

And deponent further says that he sealed the said envelope and placed the same in the mail drop for mailing at the United States Courthouse, Foley Square, Borough of Manhattan, City of New York.

T. Barry Kingham
T. BARRY KINGHAM

Sworn to before me this

26th day of NOVEMBER, 1975

Jeanette Ann Grayeb

JEANETTE ANN GRAYEB
Notary Public, State of New York
No. 24-[illegible]75
Qualified in Kings County
Commission Expires March 30, 1977